

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1098

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS OWENS, a/k/a "Bubba",

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Thomas Owens, also known as "Bubba", appeals from a judgment of conviction entered on January 11, 1974, in the United States District Court for the Southern District of New York, after a four-day trial before the Honorable Robert J. Ward, United States District Judge, and a jury.*

Indictment 73 Cr. 786, filed August 10, 1973, charged in Count One that Owens conspired with Heywood Hyman, Willie Washington, Alton Young and Sandra Thompson to distribute narcotic drugs and possess narcotic drugs with the intent to distribute them, in violation of Title 21, United States Code, Section 846. Counts Two through Six of the indictment charged Hyman, Washington and Young, but

* On February 4, 1974, Alton Young, a co-defendant of Owens filed a Notice of Appeal from the judgment entered against him on February 4, 1974. Young, however, failed to perfect his appeal in accordance with this Court's scheduling order dated February 6, 1974.

not Owens, with distributing various amounts of cocaine and heroin in violation of Title 21, United States Code, Section 841. Count Seven of the indictment charged that on May 31, 1973 Owens and Thompson distributed approximately 25 grams of heroin in violation of Title 21, United States Code, Section 841.

Only Owens and Young proceeded to trial, which commenced on December 3, 1973.* On December 10, 1973 the jury found Owens guilty as charged in Counts One and Seven, and Young guilty as charged in Counts One and Four.** On January 11, 1974, Owens was sentenced to concurrent terms of seven years imprisonment on each of Counts One and Seven, to be followed by a special parole term of three years.***

Owens is presently serving his sentence.

* Prior to the commencement of the trial, on November 12, 1973, Washington withdrew his plea of not guilty to Count Two of the indictment and entered a plea of guilty. On November 28, 1973 Hyman withdrew his plea of not guilty to Counts One and Four of the indictment and entered pleas of guilty. On December 3, 1973, prior to the empanelling of the jury, Thompson withdrew her plea of not guilty to Count Seven of the indictment and entered a plea of guilty.

** Counts One, Four and Seven were the only counts in which either Owens or Young was named, and therefore, the only counts tried by the jury.

*** On January 11, 1974 Hyman was sentenced to concurrent terms of eighteen months imprisonment on each of Counts One and Four, to be followed by three years special parole. Count One was then dismissed as to Hyman.

On January 18, 1974 Washington was sentenced to three months imprisonment on Count Two, to be followed by three years special parole. Count One was then dismissed as to Washington.

On January 18, 1974 Thompson was sentenced to six months imprisonment on Count Seven, to be followed by three years special parole. Count One was then dismissed as to Thompson.

On February 4, 1974 Young was sentenced to concurrent terms of five years imprisonment on each of Counts One and Four, to be followed by three years special parole.

Statement of Facts

A. The Government's Case

(1) Introduction

Through the testimony of co-conspirator Willie Washington, undercover agent Carliese Gordon and others, the Government established that from April to August, 1973, Thomas Owens, also known as "Bubba", the appellant, was a member of a conspiracy whose object was to distribute quantities of cocaine and heroin to purchasers in the Harlem and South Bronx areas of New York City. The basic operation of the conspiracy was simple. Owens was the source of cocaine, and Young was the source of heroin. Owens sold to cocaine customers provided by Hyman and Washington. Young sold to heroin customers provided by Hyman, Washington and Owens himself. Thompson was a messenger who worked for Owens.

The Government proved six separate purchases of narcotic drugs by an undercover agent of the New York Joint Task Force. Three of these transactions, on April 10, 1973, April 12, 1973 and May 7, 1973, respectively, involved cocaine (Tr. 174, 69, 92).^{*} Owens was the source of the cocaine on each occasion. The remaining three transactions, on April 16, 1973, May 21, 1973 and May 31, 1973, respectively, involved heroin (Tr. 87, 107, 123). Young was the source of the heroin on each occasion. On May 30, 1973 Owens negotiated with the undercover agent regarding the sale of heroin which took place on May 31, 1973 (Tr. 121-122). He was present, with Young, Hyman, and Thompson when the heroin transaction took place (Tr. 123-125; GX 15-22, 23).

^{*} "Tr." refers to the trial transcript; "GX" refers to Government's Exhibits. "Br" refers to appellant's brief.

(2) April 10, 1973

In the early evening of April 10, 1973, Customs Patrol Officer Carliese Gordon, who was serving in an undercover capacity with the New York Joint Task Force, met with Heywood Hyman and an informant in Hyman's apartment at 535 W. 144th Street, in Manhattan (Tr. 163, 169-170, 323). At approximately 7:50 P.M. they were joined by Willie Washington and the appellant, Thomas Owens (Tr. 171, 254). After a brief discussion during which Gordon indicated he wanted to purchase one quarter of an ounce of cocaine, Owens and Washington left the apartment, followed shortly by Gordon, Hyman, and the informant (Tr. 171, 174, 264, 322, 328-329). Washington and Owens went to Owens' apartment in the Bronx where Washington obtained the cocaine (Tr. 263-264). Washington then delivered the cocaine to Gordon at 168th Street and the Grand Concourse in the Bronx for \$180 (Tr. 174).

(3) April 12, 1973

At approximately 3:20 P.M. on April 12, 1973 Officer Gordon called Hyman and made arrangements to purchase an ounce of cocaine that afternoon for \$720 (Tr. 69). Shortly thereafter, Gordon met Hyman at 144th Street and Amsterdam Avenue. Hyman told Gordon to wait while he went to the Bronx to get the package. Hyman returned about one hour later and the deal was consummated (Tr. 70, 293-294).

(4) April 16, 1973

At approximately 2:25 P.M. on April 16, 1973 Officer Gordon called Hyman and made arrangements to purchase an ounce of heroin that afternoon for \$1,300 (Tr. 83-84). Gordon met Hyman at 6:00 P.M. and together they drove in Gordon's car to Snookie's Bar on Seventh Avenue near 133rd Street (Tr. 85, 296). When they arrived, Hyman pointed out Alton Young, who was standing outside the bar, as the "main man". Hyman then exited from the car, approached Young, and engaged him in conversation (Tr.

85, 296). When the conversation was concluded, Young left, and Hyman reported to Gordon that "the man was going to pick up the package" (Tr. 86). Some time later, Young returned to Snookie's Bar and met inside with Hyman (Tr. 86, 377). Thereafter, Hyman returned to the car in which Gordon was waiting and directed him to drive up the block because Young "had spotted some cops" (Tr. 86). After they drove to 134th Street and Seventh Avenue, Hyman again exited from the car and met with Young who had arrived separately and was waiting for him (Tr. 86). Young handed Hyman a package containing an ounce of heroin which Hyman in turn delivered to Gordon for \$1,300 (Tr. 87).

(5) May 7, 1973

At approximately 2:00 P.M. on May 7, 1973 Officer Gordon called Hyman and made arrangements to purchase one-eighth of a kilogram of cocaine that day for \$2,100 (Tr. 92). At 3:10 P.M. Gordon met Hyman on Amsterdam Avenue near Hamilton Place (Tr. 92, 300). After Hyman excused himself to make a phone call "to find out if the man have the package", he directed Gordon to drive him to Teller Avenue and 168th Street in the Bronx (Tr. 92). When they arrived, Hyman said he was going up to apartment 4B to pick up the package (Tr. 92).^{*} After Hyman had rejoined Gordon in the car, Owens and Thompson exited the building (Tr. 94, 301). Owens told Hyman to wait for him to return (Tr. 95). At about this time, Washington arrived on the scene and joined Hyman and Gordon (Tr. 230). When Owens and Thompson returned about one-half hour later, everyone but Gordon went back up to apartment 4B (Tr. 95-96, 230-231, 301-302).

^{*} Apartment 4B, 1230 Teller Avenue, Bronx, New York is leased to Owens' brother, Levi Owens (Tr. 479, 537). Owens visited there at least once a week (Tr. 538).

Hyman came down with one-eighth of a kilogram of cocaine which he gave to Gordon for \$2,100 (Tr. 96, 302). Hyman then returned to apartment 4B where he gave Washington some money and Owens some money (Tr. 231-233).

(6) May 15, 1973

At approximately 11:40 A.M. on May 15, 1973 Officer Gordon went to the barber shop operated by Washington at 140 Hamilton Place in Manhattan. He met there with Owens and Washington (Tr. 101, 234, 303). Gordon advised that he was interested in purchasing some heroin, and Owens responded that he would see what he could do (Tr. 102, 235).

(7) May 21, 1973

In the early afternoon of May 21, 1973 Officer Gordon telephoned Washington at the barber shop with respect to the purchase of one ounce of heroin (Tr. 105). At approximately 2:45 P.M. Gordon went to the barber shop where he met Washington and Hyman (Tr. 105-106, 235-236, 304). Gordon announced that he was there for the heroin, whereupon Washington instructed Hyman to take Gordon uptown to pick up the package (Tr. 106, 236). Hyman and Gordon then proceeded in Gordon's car to Snookie's Bar at 133rd Street and Seventh Avenue, where Hyman identified Young as the "main man" and left the car to engage him in conversation (Tr. 106, 304). After talking to Young, Hyman returned to the car and told Gordon "the man is going to pick up the package" (Tr. 106). A short while later, Young's wife, Martha Ann Young, entered the bar and conversed with Hyman (Tr. 107, 305). Hyman then returned to the car with the package of heroin, which he advised that Mrs. Young had delivered (Tr. 107). Gordon paid Hyman \$1,350, a portion of which Hyman in turn delivered to Washington at the barber shop (Tr. 108, 236).

(8) May 30, 1973

On the evening of May 30, 1973 Officer Gordon telephoned Washington to complain about the package of heroin Hyman had delivered to him on May 21. He said he was not satisfied with the quantity and wanted to do business directly with Owens with whom he had discussed possible heroin transactions on May 15 (Tr. 119, 237). Washington told Gordon to come up to the barber shop and they would ride up together to see Owens in the Bronx (Tr. 119). Gordon arrived at the barber shop at approximately 9:00 P.M., and following Washington's directions drove with Washington to 1230 Teller Avenue in the Bronx (Tr. 119, 237, 307). When they arrived, Washington went up to apartment 4B where Owens was waiting. He told Owens that Gordon was downstairs and that he wanted heroin. Owens quoted a price and sent Washington down to relay it to Gordon (Tr. 307). The price Washington quoted was too high, and Gordon demanded to speak to Owens personally (Tr. 121, 238). Washington then returned to apartment 4B, and a few minutes later both he and Owens left the building and got into the car with Gordon (Tr. 121, 238, 307). Owens told Gordon the price for heroin was \$1,500 an ounce and arranged to meet him at the barber shop the next day at 1:00 P.M. to make the sale (Tr. 121-122, 239).

(9) May 31, 1973

At approximately 1:30 P.M. on May 31, 1973, Officer Gordon arrived at Washington's barber shop (Tr. 122, 239, 308). He was joined there by Washington, Owens and Thompson. Owens instructed Gordon to give him the \$1,500 and to follow him and Thompson to a location where they would pick up the package of heroin (Tr. 122).*

* Government Exhibits 9-14, photographs, and Government Exhibit 23, a video tape, all made the afternoon of May 31, 1973, depict Washington, Owens, Thompson and Gordon outside the barber shop.

thereafter, Owens and Thompson in one car, and Gordon in another, went from the barber shop to 134th Street and Seventh Avenue, near Snookie's Bar (Tr. 123, 308). When they arrived, Owens approached Gordon's car and advised him that "the man had just left but he should be returning very soon" (Tr. 123).^{*} Within a short time, Young arrived back at the bar and entered, at which time he was joined by Owens and Thompson (Tr. 310). Thompson then left the bar with the package of heroin which she delivered to Gordon while Young and Owens stood and watched on the sidewalk just outside the bar (Tr. 123-125, 310-311, 389-391).^{**} Later that day Owens returned to the barber shop and gave Washington some money (Tr. 240).

(10) June 22, 1973

In the early morning of June 22, 1973, Young was arrested at Snookie's Bar (Tr. 370). At the time of his arrest, he had in his possession a tinfoil packet containing a white powder which bore traces of cocaine (Tr. 273, 370; GX 12C).

B. The Defense Case

Owens presented three witnesses, including the defendant Thompson, and took the stand in his own defense.

Thompson testified that Owens' presence with Young at Snookie's Bar on May 31, 1973 at the time of the heroin transaction was mere coincidence. She said it was she and not Owens who had arranged the sale to Gordon in Washington's barber shop (Tr. 456) and that she had asked Owens to drive her to the bar as a favor (Tr. 457). She

^{*} At about this time, Young left Snookie's Bar, entered a car and drove off (Tr. 309, 389).

^{**} Government Exhibits 15-22, photographs, and Government Exhibit 23, a video tape, all made in the afternoon of May 31, 1973 depict Owens, Young and Thompson in conversation inside and outside of Snookie's Bar.

further maintained that the heroin was provided to her by a man named Billy whose last name she didn't know (Tr. 459-460).

Owens denied the charges contained in the indictment and corroborated Thompson's account of his involvement on May 31, 1973 (Tr. 500-506). He admitted he knew Washington (Tr. 512), but denied knowing Hyman (Tr. 516). He specifically denied that he sold any drugs on May 7, 1973.*

ARGUMENT

There was sufficient evidence to support Owens' conviction on the conspiracy count.

Owens contends that there was insufficient evidence to support the jury's verdict finding him guilty of conspiracy, as charged in Count One of the indictment. The contention is without merit. The record clearly establishes that Owens was a supplier of cocaine in a "chain" conspiracy whose purpose included the distribution of heroin as well as cocaine. In addition to his role as the source of cocaine, Owens distributed at least one ounce of heroin, which the jury was entitled to infer he obtained from his co-conspirator, Alton Young.**

* In support of his contention that he did not sell drugs on May 7, 1973, Owens produced a witness who testified that Owens was not in apartment 4B at least until after 4:30 p.m. on that day. Owens further presented testimony regarding his work record as a painter and an auto mechanic (Tr. 491-497, 565-570).

** Owens does not challenge the sufficiency of the evidence supporting Count Seven on which he was found guilty of distributing approximately 25 grams of heroin on May 31, 1973. In addition, he specifically disavows any claim that the evidence proved the existence of multiple conspiracies rather than the single conspiracy alleged in the indictment (Br. 5).

In each of the narcotics transactions on April 10, April 12 and May 7, 1973, there was evidence from which the jury could properly have found that Owens provided the cocaine to co-conspirators Willie Washington or Heywood Hyman, who in turn delivered it to the purchaser. This evidence alone was sufficient to establish Owens' guilt on the conspiracy count.

In addition, while the evidence did not establish any direct involvement by Owens in the first two heroin transactions on April 16 and May 21, he negotiated the price and was present with Young and Thompson at Snookie's Bar (the scene of the first two heroin sales), when delivery of the third package of heroin was made to Gordon on May 31. In light of the other evidence linking Owens to the other members of the conspiracy,* the jury could properly have found incredible the contention that Owens' presence on that occasion was mere coincidence. *United States v. Barrera*, 486 F.2d 333, 337 (2d Cir. 1973).

In short, the evidence establishing Owens' membership in the conspiracy was more than sufficient. *United States v. Masullo*, 489 F.2d 217, 220 (2d Cir. 1973); *United States v. Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973).

Owens' second contention, that the trial court improperly admitted into evidence a tinfoil packet containing traces of cocaine which was found in Young's possession at the time

* The fact that Owens was not aware of every act which Young, Hyman or Washington committed in furtherance of the conspiracy does not invalidate the jury's finding that they were all co-conspirators. See, e.g., *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965); *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963); *United States v. Bruno*, 105 F.2d 921 (2d Cir.), rev'd on other grounds, 308 U.S. 287 (1939).

of his arrest, is similarly lacking in merit as it rests on the unfounded argument that Owens and Young were not co-conspirators.*

CONCLUSION

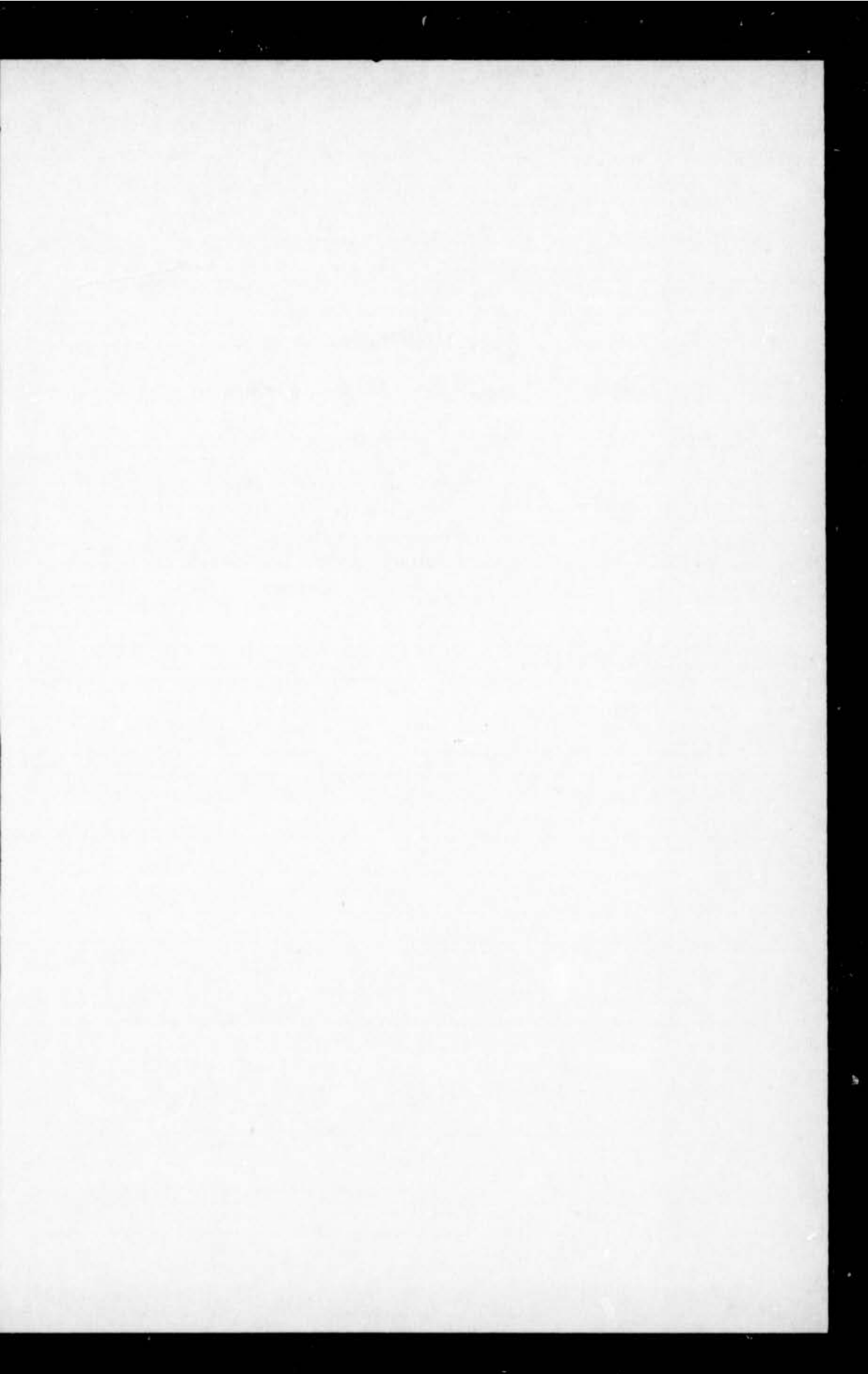
The judgment of conviction should be affirmed.

Respectfully submitted,

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Southern District of New York,
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ROBERT B. HEMLEY,
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* Assuming, *arguendo*, that the admission of the tinfoil packet was error, it would hardly be plain error requiring the reversal of Owens' convictions. Fed. R. Cr. P. 52(a). Uncontroverted evidence directly linked Owens to the delivery of 8.4 grams of cocaine on April 10, 101.8 grams of cocaine on May 7, and 25 grams of heroin on May 31, 1973. The additional impact against Owens of the traces of cocaine found on Young at the time of his arrest was clearly insignificant.



AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Robert B. Hemley, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the *8th* day of *April*, 1974
he served 2 copies of the within brief by placing the
same in a properly postpaid franked envelope addressed:

Osmond K. Fraenkel, Esq.
120 Broadway
New York, N.Y.

Ira Van Leer, Esq.
132 Nassau Street
New York, N.Y. 10038

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for mailing
at the United States Courthouse, Foley Square, Borough
of Manhattan, City of New York.

Robert B. Hemley

Sworn to before me this

8th day of *April* 1974
Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975

